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FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
FEB 04 2019	
CLERK US DISTRICT COURT	
DISTRICT OF NEVADA	
BY: <i>[Signature]</i>	DEPUTY

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19 **UNITED STATES DISTRICT COURT**

20 **DISTRICT OF NEVADA**

21 HP TUNERS, LLC, a Nevada limited liability
 22 company,

Case No. 3:19-ms-00003

23 Plaintiff,

24 vs.

25 BOBBIE CANNATA,

26 Defendant.

27 **DECLARATION OF ANDREW P.
 28 BLEIMAN IN SUPPORT OF MOTION
 29 FOR ORDER TO SHOW CAUSE WHY
 30 BOBBIE CANNATA SHOULD NOT BE
 31 FOUND IN CONTEMPT OF COURT FOR
 32 FAILURE TO COMPLY WITH
 33 SUBPOENA TO TESTIFY AT
 34 DEPOSITION AND BE COMPELLED TO
 35 COMPLY WITH SUBPOENA**

I, Andrew P. Bleiman, Esq., of full age and competency, do hereby declare and say as follows:

1. I am an attorney of the State of Illinois and the Managing Attorney of the law firm Marks & Klein, LLP's Illinois office. In that capacity, I have been entrusted with the above-captioned file. I am fully familiar with the facts and circumstances alleged herein.

1 2. This Declaration is submitted in support of HP Tuners LLC's Motion for Order to
 2 Show Cause Why Bobbie Cannata Should Not be Found in Contempt for Failure to Comply with
 3 Subpoena to Testify at Deposition and Be Compelled to Comply with Subpoena ("Motion"). All
 4 capitalized terms herein shall have the same meaning ascribed to them in the Motion.

5 3. Plaintiff has learned that Plaintiff's former business partner, Ken Cannata,
 6 unlawfully provided HP Tuners' intellectual property to Kevin Sykes-Bonnett ("Sykes-Bonnet")
 7 and Syked ECU Tuning, Inc. ("Syked ECU Tuning") (together, "Defendants").

8 4. It has also recently come to Plaintiff's attention that Ken Cannata's wife, Bobbie
 9 Cannata, is one of three shareholders in Syked ECU Tuning.

10 5. On May 8, 2018, HP Tuners filed an Amended Complaint against Sykes-Bonnett
 11 and Syked ECU Tuning in the United States District Court for the Western District of Washington
 12 in the matter of *HP Tuners, LLC v. Kevin Sykes-Bonnett, et. al.*, Civil Action No. 3:17-cv-05760
 13 BHS, alleging that defendants individually and in concert with other individuals misappropriated
 14 Plaintiff's trade secrets and proprietary information, and knowingly generated, created, used,
 15 obtained, and distributed fraudulent application keys. A true and correct copy of the Amended
 16 Complaint (without accompanying exhibits) is attached hereto as Exhibit A.

17 6. On September 11, 2018, Plaintiff properly issued Bobbie Cannata a subpoena to
 18 testify at deposition and provide documents pursuant to Fed. R. Civ. P. 45, and which set the
 19 deposition date for October 16, 2018 (the "Subpoena"). Attached hereto as Exhibit B is a true and
 20 correct copy of the Subpoena.

21 7. On October 4, 2018, less than two (2) weeks before the scheduled deposition, Ken
 22 Cannata, filed a Motion to Quash the Subpoena (the "Motion to Quash") based upon relevance
 23 and marital privilege. The Motion to Quash was denied pursuant to court order dated November
 24 28, 2018. A true and correct copy of the November 28, 2018 Order denying the Motion to Quash
 25 is attached hereto as Exhibit C.

26 8. On September 10, 2019, the process server executed a sworn Declaration of
 27 Attempts specifying the numerous attempts she undertook to affect service of the Subpoena on

1 Bobbie Cannata, and the evidence the process server observed indicating that Bobbie Cannata was
2 deliberately evading service. A true and correct copy of the Declaration of Attempts is attached
3 hereto as Exhibit D.

4 9. Despite the court's clear and unambiguous refusal to quash the Subpoena, Bobbie
5 Cannata has failed to appear for deposition or produce any documents, as required.

6 I declare that all of the foregoing is true and accurate to the best of my knowledge, and if
7 any of the foregoing is willfully false, I am subject to punishment.

8 DATED this 31st day of January, 2019.

9 /s/ Andrew P. Bleiman
10 ANDREW P. BLEIMAN

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1 INDEX OF EXHIBITS

2 Exhibit	3 Description	4 Number of Pages
5 A	6 Amended Complaint (without accompanying exhibits) filed in 7 <i>HP Tuners, LLC v. Kevin Sykes-Bonnett, et. al.</i> , Civil Action 8 No. 3:17-cv-05760 BHS	9 30 pages
10 B	11 Subpoena to Testify at Deposition and Provide Documents 12 Pursuant to Fed. R. Civ. P. 45 issued to Bobbie Cannata	13 4 pages
14 C	15 November 28, 2018 Order Denying Ken Cannata's Motion to 16 Quash	17 6 pages
18 D	19 Declaration of Attempts	20 3 pages

EXHIBIT A

Amended Complaint (without accompanying exhibits) filed in
HP Tuners, LLC v. Kevin Sykes-Bonnett, et. al.,
Civil Action No. 3:17-cv-05760 BHS

1 HONORABLE BENJAMIN H. SETTLE
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 HP TUNERS, LLC, a Nevada limited liability company,)
11 Plaintiff,) CASE NO. 3:17-cv-05760-BHS
12 vs.)
13 KEVIN SYKES-BONNETT,)
14 SYKED ECU TUNING INCORPORATED,)
15 a Washington corporation, and JOHN MARTINSON,)
16 Defendants.)
17)
18)
19)
20)
21)

22 Plaintiffs HP TUNERS, LLC, a Nevada limited liability company ("HPT"), by its
23 attorneys, for its Complaint for Injunctive Relief ("Complaint") against Defendants KEVIN
24 SYKES-BONNETT ("Sykes-Bonnett"), JOHN MARTINSON ("Martinson") and SYKED ECU
25 TUNING INCORPORATED ("Syked") (collectively, Sykes-Bonnett, Martinson and Syked are
referred to herein as "Defendants"). In support thereof, HPT states as follows:

26 **NATURE OF THE ACTION**

27 1. At substantial expense, hard work and ingenuity over the course of many years
28 and thousands of man hours, HPT has developed complete, cost effective tuning and data
29 acquisition solutions for automobile enthusiasts and professional shops.

2. Over the years, HPT has carefully guarded its proprietary products and source code in order to protect its trade secrets, specifications and software.

3. Sykes-Bonnett and Martinson, acting individually and on behalf of Syked ECU Tuning Incorporated, wrongfully obtained and possesses HPT's confidential and proprietary source code, and has misappropriated HPT's trade secrets and proprietary information.

4. This is an action against Defendants for: (i) violation of the Computer Fraud and Abuse Act (“CFAA”) arising under 18 U.S.C. §1030; (ii) violation of the Defend Trade Secrets Act (“DTSA”), 18 U.S.C. §1836 et seq.; (iii) misappropriation of trade secrets arising under the Washington Uniform Trade Secrets Act, RCW 19.108; (iv) violation of the Illinois Trade Secrets Act, 765 ILCS 1065/1 et. seq.; (v) unfair competition under the Washington Consumer Protection Act, RCW 19.86.020; (vi) unfair competition under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et. seq.; (vii) breach of contract; and (viii) tortious interference with prospective economic relations.

PARTIES

5. HPT is a Nevada limited liability company with its principal place of business in Buffalo Grove, Illinois. None of HPT's members reside in this judicial district.

6. Kevin Sykes-Bonnett is a resident of Washington and is the President of Sykes ECU Tuning Incorporated.

7. John Martinson is a resident of Washington and an officer of Syked ECU Tuning Incorporated.

8. Syked ECU Tuning Incorporated is a corporation existing under the laws of Washington with its principal places of business in Puyallup, Washington.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction for the CFAA and DTSA claims pursuant to 28 U.S.C. §1331. This Court has supplemental jurisdiction for the state law claims pursuant to 28 U.S.C. §1337.

10. This Court has jurisdiction over the parties and subject matter in this civil action pursuant to 28 U.S.C. § 1332(a) in that the parties are citizens of different states and that the matter in controversy exceeds the sum of \$75,000, exclusive of interests and costs.

11. Venue is proper in this judicial district pursuant to 28 U.S.C. §1331(b) in that Defendants are residents of the State in which the district is located and a substantial part of the events or omissions giving rise to the claims asserted in this Complaint occurred in this judicial district.

BACKGROUND FACTS

12. HPT is a niche business, which provides complete, cost effective automotive tuning and data acquisition solutions for enthusiasts and professional shops.

13. HPT's business includes but is not limited to computer hardware and software designed for use in custom and/or pre-programmed engine and transmission tuning and calibration applications for automobiles, trucks and other types of vehicles (including but not limited to ATV's, snowmobiles and watercraft) (the "HP Tuners Business").

14. HPT has expended significant time, money and resources to develop the HP Tuners Business, and HPT has created methods of business, strategies, programs and technologies which did not exist in the industry prior to HPT's development of the HP Tuners Business.

1 15. HPT conducts business nationwide. Over the years, HPT has invested a
2 great deal of time and money in developing its proprietary products and source code,
3 and in building and growing the HP Tuners Business.

4 16. In order for HPT to gain a competitive advantage in the industry, it has cultivated,
5 nurtured and maintained an extensive network of vendors, resellers and customers to which
6 HPT provides its products and offerings. HPT's network of vendors, resellers and
7 customers is expansive and relies on HPT to ensure that only authorized, authentic products
8 and offerings are available in the marketplace.

9 17. HPT invests a substantial amount of money and other resources in developing and
10 maintaining its network of vendors, reseller and customers.

12 18. HPT prides itself in catering to the needs of its vendors, resellers and
13 customers and providing authorized, authentic and functional products and offerings, and
14 the most competitive pricing in the industry.

15 19. HPT works diligently to create new products and offerings and to quickly
16 and adeptly match its vendors, resellers and customers' needs and requests.

17 20. HPT is constantly working to develop its products, source code and offerings, and
18 has devoted substantial time, money and resources to protect its confidential and proprietary
19 information, and to avoid efforts by third parties to pirate HPT's products and offerings.

21 21. As a result of HPT's reputation, exceptional service, and diligent development
22 of products and offerings, HPT has developed long-standing relationships with many of its
23 vendors, resellers and customers.

24 22. HPT's confidential and proprietary software, source code, license key
25 generator and offerings have been developed and extensively refined by HPT at a

1 substantial cost and effort and constitute confidential information and valuable trade
2 secrets of HPT (collectively, the "Confidential Information").

3 23. HPT derives economic value from the fact that its Confidential Information
4 is not known outside of HPT's business and is not available through any public records and
5 information sources. HPT's Confidential Information cannot be independently developed by
6 its competitors without great effort and expense.
7

8 24. Recognizing the economic value that it derives from its Confidential
9 Information, as well as the potential value of this information to its competitors, HPT
10 requires that its Confidential Information be kept strictly confidential by its employees and
11 restricts access to this information. HPT has taken substantial steps and security measures to
12 protect the confidentiality of its Confidential Information, including but not limited to the
13 following:

14 a) HPT protects access to its Confidential Information through computer
15 passwords;

16 b) HPT protects to its Confidential Information through hard drive encryption
17 on all employee's computers;

18 c) HPT protects access to its Confidential Information through sophisticated
19 firewalls;

20 d) HPT protects distribution of Confidential Information through non-
21 compete and non-disclosure agreements;

22 e) HPT limits the number of employees having access to its Confidential
23 Information.

24 f) Employees are given access to HPT's Confidential

1 Information on a "need to know" basis;

2 g) HPT does not give access to its Confidential Information to non-
3 employees;

4 h) HPT employees are forbidden from copying, transferring or otherwise
5 duplicating any of HPT's Confidential Information; and

6 i) HPT requires each employee to return to HPT all Confidential Information
7 when the employee leaves HPT's employ.

8 25. Furthermore, HPT undertook reasonable measures to maintain the secrecy of its
9 proprietary products, source code, software and offerings, including but not limited to entering
10 into licensing agreements with protective clauses and installing security measures to prevent
11 others from obtaining access and pirating HPT's confidential and proprietary products, source
12 code, software and offerings.

13 26. On or about September 28, 2015, Sykes-Bonnett was issued an HPT Interface
14 with eight (8) credits.

15 27. In connection with the HPT Interface issued to Sykes-Bonnett and Defendants'
16 use of HPT's software, Defendants entered into an End User License Agreement ("EULA") with
17 HPT on or about September 28, 2015. (A copy of the EULA is attached hereto as Exhibit A).

18 28. The EULA provided, in pertinent part:

19 You may not create a derivative work, reverse engineer, decompile, or
20 disassemble the SOFTWARE PRODUCT, except and only to the extent
21 that such activity is expressly permitted by applicable law notwithstanding
22 this limitation

23 25 (See Exhibit A).

1 29. On or about October 11, 2016, in violation of the EULA, Sykes-Bonnett provides
2 a screenshot to Eric Brooks, an HPT employee, showing a feature obtained by Sykes-Bonnett
3 through reverse engineering and hacking the software. (A copy of the screenshot is attached
4 hereto as Exhibit B).

5 30. In same screenshot, Sykes-Bonnett hints at having reverse engineered the HPT
6 software and intent to create licensing defeat software. (See Exhibit B)

7 31. Thereafter, on or November 3, 2016, Sykes-Bonnett threatens to make HPT
8 software with licensing defeated to the public, and admits to hacking Diablo (an HPT
9 competitor) handheld devices. (A copy of the screenshot is attached hereto as Exhibit C).

10 32. On the same day, Sykes-Bonnett admits to copying SCT's intellectual property
11 and using it in its own software (an HPT competitor) intellectual property and using in own
12 software. (A copy of the screenshot is attached hereto as Exhibit D). Sykes-Bonnett further
13 threatens to copy HPT's intellectual property. (See Exhibit D).

14 33. On November 3, 2016, Sykes-Bonnett further admits to "breaking a few things to
15 get what Keith [Prociuk, who is a current owner] and Ken [Cannata, who is a former owner]
16 promised," which is a reference to defeating HPT's software licensing for his own benefit. (A
17 copy of the screenshot is attached hereto as Exhibit E).

18 34. In a message also dated November 3, 2016 to Eric Brooks, Sykes-Bonnett admits
19 to having "wasted alot [sic] of time reversing [HPT] shit." (A copy of the message is attached
20 hereto as Exhibit F).

21 35. On November 15, 2016, Sykes-Bonnett posts on the popular social media website
22 Facebook that he is allegedly owed 42 credits by HPT. (A copy of the Facebook post is attached
23 hereto as Exhibit G).

1 36. These credits are subsequently issued on same day by HPT and Sykes-Bonnett
2 states in a message to Eric Brooks that all “debts” have been settled. (A copy of the messages
3 between Sykes-Bonnett and Eric Brooks are attached hereto as Exhibit H).

4 37. On December 1, 2016, Sykes-Bonnett admits to Eric Brooks in a message that he
5 sent a Facebook friend request to Matt Honeycutt. (A copy of the message to Eric Brooks is
6 attached as Exhibit I).

7 38. On January 16, 2017, Sykes-Bonnett sent a message to Eric Brooks referencing
8 posts made by Matthew Honeycutt on Facebook, which confirms the Facebook “friendship”
9 status between Sykes-Bonnett and Matthew Honeycutt. (A copy of the messages between Sykes-
10 Bonnett and Eric Brooks dated January 16, 2017 are attached hereto as Exhibit J).

12 39. On February 9, 2017, an email from the sender isisdistribution@hotmail.com
13 advertises the availability a hacked HPT cable with multiple tuning credits. (A copy of the email
14 received sent by isisdistribution@hotmail.com is attached hereto as Exhibit K).

15 40. On March 16, 2017, Sykes-Bonnett posts a message concerning the availability of
16 a stolen/hacked HPT interface for sale on a Facebook automotive group. (A copy of the
17 Facebook post is attached hereto as Exhibit L).

18 41. The pictures depicting the vehicles and credits available in the email from
19 isisdistribution@hotmail.com and the Facebook post by Sykes-Bonnett are markedly similar and
20 suggest that Sykes-Bonnett and/or others acting in concert with him are behind
21 isisdistribution@hotmail.com email address. (See Exhibit K and Exhibit L).

23 42. On March 28, 2017, in a message to Eric Brooks, Sykes-Bonnett defends his sale
24 of a stolen/cloned HPT interface and contends that HPT “stole a lot of shit in the beginning of

1 HPT and closed the forum and went corp.” (A copy of the March 28, 2017 message is attached
2 as Exhibit M).

3 43. On April 7, 2017, Sykes-Bonnett posts a screenshot on Facebook of his alleged
4 software showing a listing of copied HPT parameters. (A copy of the Facebook post is attached
5 hereto as Exhibit N).

6 44. On April 8, 2017 at 7:26 a.m., one of Sykes-Bonnett’s Facebook “friends”,
7 Morgan Rickard comments “you really don’t like HP Tuners lmao.” (See Exhibit N).

8 45. On April 8, 2017 at 5:06 p.m., Sykes-Bonnett responds as follows: “#fuckhpt
9 Keith, and ken are 2 of the 3 owners and are both bitches. Want to buy shit and pay nothing for
10 it. Fuck them all. I hope they go broke.” (See Exhibit N).

12 46. On June 24, 2017, the username “ecumaster” on mhhauto.com posts for the first
13 time with intent to help with generating licenses for HPT software publicly stating “I can help
14 you with credits for cheap.” (See Exhibit O attached hereto).

15 47. Upon information and belief, “ecumaster” is Sykes-Bonnett acting in concert with
16 Matthew Honeycutt and others.

17 48. On June 28, 2017, on the HPT forum, “ecumaster” advertises “Hacked Credits”
18 for HPT’s VCM Suite software. (See Exhibit P attached hereto). The post states: “No Dramas
19 or Hassles cheap credits. Only \$25aud each, 8 for \$100aud or 20 for \$200aud.
20 discounthptunercredits@mail.com Cheers”. (See Exhibit P).

22 49. On July 6, 2017, on the HPT forum, the username “crackedyou” advertises
23 “cracked” software and licenses. (See Exhibit Q attached hereto). The post states as follows:

24 Cracked 2.24
25

1 So we have successfully cracked and patched HPTuner VCM software to
2 never ask for licenses. You can read, write and edit/save most all 1998-
3 2014 GM cars and some early Ford to about 2010 and Dodge stuff they
4 supported. Email discounthptunercredits@mail.com if you are interested
5 in this version. The 3.4 and 3.5 has [sic] been patched already and is [sic]
6 in testing and then we will crack 3.6 and remove the call back to the
7 server.

8 You can read, save, edit and flash any supported files without EVER being
9 asked to license. You can use your existing cable or a brand new one and
10 new [sic] use another credit again.

11 Cheers

12 50. Upon information and belief, “crackedyou” is an alias for “ecumaster”, and is also
13 Sykes-Bonnett acting in concert with Matthew Honeycutt and others.

14 51. The significance of the “cracked” software advertised by crackedyou and
15 ecumaster is that it allows users to bypass all licensing checks and prompts, thus enabling HPT’s
16 users to use the software on any vehicle they wish without paying any licensing fees to HPT.

17 52. HPT did not authorize crackedyou, ecumaster or any others to modify HPT’s
18 software to bypass all licensing checks and prompts to obtain “free” tuning credits from HPT.

19 53. On July 6, 2017, HPT contacts discounthptunercredits@mail.com via alias Peter
20 Brodski and purchases four (4) discounted Dodge credits. (See Exhibit R attached hereto).

21 54. HPT receives the credits and verifies that it correctly generates the license keys.

22 55. On July 14, 2017, discounthptunercredits@mail.com emails select HPT
23 employees (including an employee whose association with HPT is not publicly known to anyone

1 besides this employee's family, current HPT employees and former HPT employees) containing
2 a link to a "cracked" version of HPT's VCM Suite Software version 3.4. (See Exhibit S attached
3 hereto). The email contains a link to HPT's "cracked" proprietary source code and decryption
4 key (which have been redacted on Exhibit S). The email contends that
5 discounthptunercredits@mail.com has "patched" versions 3.5 and 3.6 of HPT's VCM Suite
6 Software as well. (See Exhibit S).

7 56. On August 21, 2017, discounthptunercredits@mail.com emails select HPT
8 employees demanding a public apology from HPT. (See Exhibit T).

10 57. Specifically, on August 21, 2017 at 1:05 p.m., various HPT personnel received an
11 email from discounthptunercredits@mail.com demanding a public apology from HPT and which
12 threatened the public release of a cracked version of HPT's VCM Suite Software 3.6, its newest
13 release. (See Exhibit T). The email containing the extortion threat stated:

14 Still waiting for the apology for fucking everyone when you shut down the
15 open source. Here is a fully cracked 3.6 with no licensing required EVER.
16 Don't make me release this. You have until the end of the week.

17 58. The email contains a link to HPT's "cracked" proprietary source code and
18 decryption key (which have been redacted on Exhibit T). As stated above,
19 discounthptunercredits@mail.com was previously selling discounted credits to third parties,
20 which credits have been unlawfully generated using HPT's software.

22 59. The August 21, 2017 email from discounthptunercredits@mail.com makes
23 reference to when HPT allegedly "shut down the open source" which Sykes-Bonnett also
24 complained about to Eric Brooks in his message of March 28, 2017. (See Exhibit T and Exhibit
25 M).

1 60. On August 23, 2017, Keith Prociuk, one of HPT's owners, posts a message to
2 discounthptunercredits@mail.com containing an explanation in response to the threat received
3 on August 21, 2017. (See Exhibit U attached hereto).

4 61. On August 25, 2017, in connection with arbitration proceedings against a former
5 HPT employee, HPT obtains a temporary restraining order in that matter arising out of the
6 extortion email sent by discounthptunercredits@mail.com.

7 62. On August 25, 2017, discounthptunercredits@mail.com sends an email to HPT
8 claiming that they will no longer release software. (See Exhibit V attached hereto).

9 63. Likewise, on August 25, 2017, ecumaster disables all previously posted mega.nz
10 links to hacked HP Tuners software.

11 64. Upon information and belief, Sykes-Bonnett has worked with others, including
12 but not limited to Defendants, Christopher Breton-Jean and Matthew Honeycutt to reverse
13 engineer and remove licensing from HPT's VCM Suite Software and to distribute it for their
14 own profit as well as to attempt to cause harm to HPT as a company, which they view as
15 competitors.

16 65. In fact, documentation received from PayPal in connection with the
17 discounthptunercredits@mail.com email (which was collecting money for the discounted credits
18 that were being offered for sale) demonstrates that funds were *paid* by
19 discounthptunercredits@mail.com to Christopher Breton-Jean, a known colleague, friend and
20 associate of Sykes-Bonnett.

21 66. Upon information and belief, Defendants, Christopher Breton-Jean and others
22 (including but not limited to Lani Carney who resides in Australia but is likely a stolen identity)
23 conspired to create the discounthptunercredits@mail.com email.

1 67. A fundamental component of HPT's business is the sale and distribution of credits
2 via application keys, which are the license mechanism used by customers to tune vehicles.

3 68. Only HPT is authorized to generate authentic application keys for use with HPT's
4 products and HPT credits are generally sold for approximately \$50.00 USD.

5 69. However, Defendants have misappropriated HPT's trade secrets and proprietary
6 information and have knowingly generated, created, used and/or obtained fraudulent application
7 keys that were not generated by HPT.

8 70. Upon information and belief, they used the email to unlawfully market and sell
9 thousands of discounted HPT credits.

10 71. Upon information and belief, in connection with this scheme, Defendants,
11 themselves and through others, sold such fraudulent application keys.

12 72. Upon information and belief, in connection with this scheme, Lani Carney
13 created a PayPal account, collected the funds received from sales of discounted HPT credits, and
14 then in turn paid funds to Christopher Breton-Jean and Sykes-Bonnett after receiving them.

15 73. Defendants, acting in concert with others, have wrongfully acquired and possess
16 an HPT license generator tool, which they have used to generate and sell licenses publicly that
17 have been passed off as genuine and authentic products and offerings of HPT.

18 74. Defendants, acting in concert with others, have wrongfully accessed, trespassed,
19 engineered and/or hacked HPT's software, systems and source code to remove licensing
20 restrictions from HPT's VCM Suite Software to distribute it for their own profit as well as to
21 cause harm to HPT, which Defendants view as a competitor.

22 75. Defendants, acting in concert with others, accomplished this via various means
23 including adding extra licenses to existing interfaces and reselling them, by logging in via remote

1 desktop to customer machines to enter in a hacked license key and by selling a version of hacked
2 software with licensing defeated.

3 76. Defendants, acting in concert with others, have attempted to mask their identities
4 by using fake Australian persona and using spoofed Australian internet protocols.

5 77. Defendants, acting in concert with others, have publicly posted confidential and
6 proprietary information of HPT including screenshots of HPT's parameter lists which were
7 stolen and which Defendants incorporated into their own software.

8 78. Defendants, acting in concert with others, have also attempted to sell a cloned
9 HPT interface with hacked credits on Facebook for their own profit as well as to cause harm to
10 HPT, which Defendants view as a competitor.

12 79. Defendants' generation and/or use of fraudulent application keys to obtain credits
13 without purchasing them from HPT constitutes a violation of the terms and provisions of the
14 EULA, otherwise infringes upon HPT intellectual property rights and constitutes a
15 misappropriation of HPT's confidential and proprietary information.

16 80. Defendants have knowingly and wrongfully acquired, possess and are using
17 fraudulent application keys to generate licenses, tune vehicles and generate revenues for their
18 own benefit or the benefit of others.

19 81. Defendants' misconduct includes adding extra licenses to existing interfaces using
20 fraudulent application keys, which were not generated by HPT.

22 **COUNT I**

23 **VIOLATION OF COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. §1030**

24 82. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth
25 herein.

1 83. Defendants, knowingly and with intent to defraud, wrongfully accessed,
2 trespassed, engineered and/or hacked HPT's software, systems and source code to remove
3 licensing restrictions from HPT's VCM Suite Software to distribute it for their own profit as well
4 as to cause harm to HPT, which Defendants view as a competitor.

5 84. Moreover, Defendants, acting in concert with others, accomplished this via
6 various means including adding extra licenses to existing interfaces and reselling them, by
7 logging in via remote desktop to customer machines to enter in a hacked license key and by
8 selling a version of hacked software with licensing defeated.
9

10 85. HPT's business, computers, software, systems and source code are used in, and
11 affect, interstate commerce.

12 86. Moreover, in doing so, Defendants intended to and succeeded in obtaining
13 something of value in excess of \$5,000 per year (as required by the CFAA).

14 87. Through its fraudulent activity, Defendants have generated profits and obtained
15 revenues that otherwise would have gone to HPT.

16 88. Defendants' activities described hereinabove constitute a violation of the CFAA,
17 18 U.S.C. §1030(a)(4).

18 89. Plaintiff, HPT, may maintain a civil action against Defendants for violations of
19 the CFAA pursuant to 18 U.S.C. §1030(g).

20 90. HPT is entitled to compensatory damages, injunctive relief and other equitable
21 relief.

22 91. On or about March 27, 2017, and subsequently thereto, HPT demanded that
23 Defendants cease and desist from their offending conduct.

25 92. However, Defendants have failed to comply.

93. As a direct and proximate result of Defendants' ongoing violations and the misconduct alleged herein, HPT has suffered, and will continue to suffer substantial injuries, loss and damage to its business and goodwill in an amount to be proven at trial.

94. If Defendants are permitted to continue its conduct, HPT will be irreparably harmed. HPT has been and continues to be damaged in an amount to be proven at trial and also in a manner and amount that cannot be fully measured or compensated in economic terms. Such irreparable damage will continue unless Defendants' conduct is enjoined during the pendency of this action and thereafter.

COUNT II

VIOLATION OF THE DEFEND THE TRADE SECRETS ACT, 18 U.S.C. § 1836

WASHINGTON UNIFORM TRADE SECRET ACT, RCW 19.108

95. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth herein.

96. HPT owned and possessed confidential and proprietary documents and data containing trade secrets, including but not limited to source code.

97. Without authorization by HPT, upon information and belief, a third party (who was a former employee of HPT) provided Defendants with copies of and access to confidential and proprietary information of HPT, including its confidential and proprietary source code.

98. The confidential and proprietary source code wrongfully obtained and possessed by Defendants gives Defendants, and those active in concert with them, the ability to modify HPT's confidential and proprietary source code to allow users to bypass all licensing checks and prompts, thus enabling HPT's users to use the software on any vehicle they wish without paying any licensing fees to HPT.

1 99. HPT's confidential and proprietary source code has never been accessible to the
2 public.

3 100. HPT has taken various reasonable measures to ensure that its source code remains
4 confidential and proprietary, and to prevent misappropriation of its confidential and proprietary
5 trade secrets, including its source code.

6 101. HPT's trade secrets derive independent economic value, both actual and potential,
7 from not being generally known to other persons, businesses, or the public, who could obtain
8 economic value from their disclosure or use.

9 102. In violation of law, Defendants have misappropriated HPT's trade secrets by
10 modifying HPT's confidential and proprietary software to bypass all licensing checks and
11 prompts to obtain "free" tuning credits from HPT.

12 103. Defendants, acting in concert with others, have wrongfully accessed, trespassed,
13 engineered and/or hacked HPT's software, systems and source code to remove licensing
14 restrictions from HPT's VCM Suite Software to distribute it for their own profit as well as to
15 cause harm to HPT, which Defendants view as a competitor.

16 104. Moreover, Defendants, acting in concert with others, accomplished this via
17 various means including adding extra licenses to existing interfaces and reselling them, by
18 logging in via remote desktop to customer machines to enter in a hacked license key and by
19 selling a version of hacked software with licensing defeated.

20 105. Furthermore, Defendants have misappropriated HPT's parameter lists without
21 HPT's authorization and by having incorporated them into Defendants' own software.

22 106. Likewise, Defendants have misappropriated HPT's confidential and proprietary
23 information by attempting to sell a cloned HPT interface with hacked credits on the internet.

107. Such use of HPT's confidential and proprietary trade secret information constitutes misappropriation under the DTSA.

108. As a direct and proximate result of Defendants' ongoing violations and the misconduct alleged herein, HPT has suffered, and will continue to suffer substantial injuries, loss and damage to its business and goodwill in an amount to be proven at trial.

109. If Defendants are permitted to continue its conduct, HPT will be irreparably harmed. HPT has been and continues to be damaged in an amount to be proven at trial and also in a manner and amount that cannot be fully measured or compensated in economic terms. Such irreparable damage will continue unless Defendants' conduct is enjoined during the pendency of this action and thereafter.

COUNT III

VIOLATION OF THE WASHINGTON UNIFORM TRADE SECRET ACT, RCW 19.108

110. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth herein.

111. HPT owned and possessed confidential and proprietary documents and data containing trade secrets, including but not limited to source code.

112. Without authorization by HPT, upon information and belief, a third party (who was a former employee of HPT) provided Defendants with copies of and access to confidential and proprietary information of HPT, including its confidential and proprietary source code.

113. The confidential and proprietary source code wrongfully obtained and possessed by Defendants gives Defendants, and those active in concert with them, the ability to modify HPT's confidential and proprietary source code to allow users to bypass all licensing checks and

1 prompts, thus enabling HPT's users to use the software on any vehicle they wish without paying
2 any licensing fees to HPT.

3 114. HPT's confidential and proprietary source code has never been accessible to the
4 public and is valued at millions of dollars.

5 115. HPT has taken various reasonable measures to ensure that its source code remains
6 confidential and proprietary, and to prevent misappropriation of its confidential and proprietary
7 trade secrets, including its source code.

8 116. HPT's trade secrets derive independent economic value, both actual and potential,
9 from not being generally known to other persons, businesses, or the public, who could obtain
10 economic value from their disclosure or use.

12 117. In violation of law, Defendants have misappropriated HPT's trade secrets by
13 modifying HPT's confidential and proprietary software to bypass all licensing checks and
14 prompts to obtain "free" tuning credits from HPT.

15 118. Defendants, acting in concert with others, have wrongfully accessed, trespassed,
16 engineered and/or hacked HPT's software, systems and source code to remove licensing
17 restrictions from HPT's VCM Suite Software to distribute it for their own profit as well as to
18 cause harm to HPT, which Defendants view as a competitor.

19 119. Moreover, Defendants, acting in concert with others, accomplished this via
20 various means including adding extra licenses to existing interfaces and reselling them, by
21 logging in via remote desktop to customer machines to enter in a hacked license key and by
22 selling a version of hacked software with licensing defeated.

24 120. Furthermore, Defendants have misappropriated HPT's parameter lists without
25 HPT's authorization and by having incorporated them into Defendants' own software.

121. Likewise, Defendants have misappropriated HPT's confidential and proprietary information by attempting to sell a cloned HPT interface with hacked credits on the internet.

122. Such use of HPT's confidential and proprietary trade secret information constitutes misappropriation under the Washington Uniform Trade Secrets Act, RCM 19.108.

123. As a direct and proximate result of Defendants' ongoing violations and the misconduct alleged herein, HPT has suffered, and will continue to suffer substantial injuries, loss and damage to its business and goodwill in an amount to be proven at trial.

124. If Defendants are permitted to continue their misconduct, HPT will be irreparably harmed. HPT has been and continues to be damaged in an amount to be proven at trial and also in a manner and amount that cannot be fully measured or compensated in economic terms. Such irreparable damage will continue unless Defendants' conduct is enjoined during the pendency of this action and thereafter.

COUNT IV

VIOLATION OF THE ILLINOIS TRADE SECRETS ACT, 765 ILCS 1065/1, ET. SEQ.

125. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth herein.

126. HPT owned and possessed confidential and proprietary documents and data containing trade secrets, including but not limited to source code.

127. Without authorization by HPT, upon information and belief, a third party (who was a former employee of HPT) provided Defendants with copies of and access to confidential and proprietary information of HPT, including its confidential and proprietary source code.

128. The confidential and proprietary source code wrongfully obtained and possessed by Defendants gives Defendants, and those active in concert with them, the ability to modify

1 HPT's confidential and proprietary source code to allow users to bypass all licensing checks and
2 prompts, thus enabling HPT's users to use the software on any vehicle they wish without paying
3 any licensing fees to HPT.

4 129. HPT's confidential and proprietary source code has never been accessible to the
5 public.

6 130. HPT has taken various reasonable measures to ensure that its source code remains
7 confidential and proprietary, and to prevent misappropriation of its confidential and proprietary
8 trade secrets, including its source code.

9 131. HPT's trade secrets derive independent economic value, both actual and potential,
10 from not being generally known to other persons, businesses, or the public, who could obtain
11 economic value from their disclosure or use.

13 132. In violation of law, Defendants have misappropriated HPT's trade secrets by
14 modifying HPT's confidential and proprietary software to bypass all licensing checks and
15 prompts to obtain "free" tuning credits from HPT.

16 133. Defendants, acting in concert with others, have wrongfully accessed, trespassed,
17 engineered and/or hacked HPT's software, systems and source code to remove licensing
18 restrictions from HPT's VCM Suite Software to distribute it for their own profit as well as to
19 cause harm to HPT, which Defendants view as a competitor.

20 134. Moreover, Defendants, acting in concert with others, accomplished this via
21 various means including adding extra licenses to existing interfaces and reselling them, by
22 logging in via remote desktop to customer machines to enter in a hacked license key and by
23 selling a version of hacked software with licensing defeated.

25

135. Furthermore, Defendants have misappropriated HPT's parameter lists without HPT's authorization and by having incorporated them into Defendants' own software.

136. Likewise, Defendants have misappropriated HPT's confidential and proprietary information by attempting to sell a cloned HPT interface with hacked credits on the internet.

137. Such use of HPT's confidential and proprietary trade secret information constitutes misappropriation under the Illinois Trade Secrets Act.

138. As a direct and proximate result of Defendants' ongoing violations and the misconduct alleged herein, HPT has suffered, and will continue to suffer substantial injuries, loss and damage to its business and goodwill in an amount to be proven at trial.

139. If Defendants are permitted to continue its conduct, HPT will be irreparably harmed. HPT has been and continues to be damaged in an amount to be proven at trial and also in a manner and amount that cannot be fully measured or compensated in economic terms. Such irreparable damage will continue unless Defendants' conduct is enjoined during the pendency of this action and thereafter.

COUNT V

UNFAIR COMPETITION UNDER THE
WASHINGTON CONSUMER PROTECTION ACT, RCW 19.86.020

140. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth herein.

141. Through the acts described hereinabove, Defendants have engaged in unfair practices in violation of the public interest by misappropriating the trade secrets of HPT.

142. Specifically, Defendants' deceives the public by passing off HPT credits and license keys as authentic products and offerings of HPT when, in fact, they are not.

1 143. Defendants' misconduct, as described hereinabove, affects the public interest.

2 144. HPT's interests have been injured in numerous ways as a result of Defendants'
3 unfair and deceptive acts and practices.

4 145. But for Defendants' unfair and deceptive practices, HPT would not have suffered
5 these injuries.

6 **COUNT VI**

7 **UNFAIR COMPETITION UNDER THE ILLINOIS CONSUMER FRAUD AND**
8 **DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS 505/1 ET. SEQ.**

9 146. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth
10 herein.

12 147. Through the acts described hereinabove, Defendants have engaged in unfair
13 practices in violation of the public interest by misappropriating the trade secrets of HPT.

14 148. Specifically, Defendants' deceives the public by passing off HPT credits and
15 license keys as authentic products and offerings of HPT when, in fact, they are not.

16 149. Defendants' misconduct, as described hereinabove, affects the public interest.

17 150. HPT's interests have been injured in numerous ways as a result of Defendants'
18 unfair and deceptive acts and practices.

19 151. But for Defendants' unfair and deceptive practices, HPT would not have suffered
20 these injuries.

22 **COUNT VII**

23 **BREACH OF CONTRACT**

24 152. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth
25 herein.

1 153. On or about September 28, 2015, in connection with Defendants' use of HPT's
2 software, Defendants entered into the EULA with HPT.

3 154. The EULA is a valid and enforceable contract.

4 155. HPT fully performed its obligations under the EULA.

5 156. The EULA provided, in pertinent part:

6 You may not create a derivative work, reverse engineer, decompile, or
7 disassemble the SOFTWARE PRODUCT, except and only to the extent
8 that such activity is expressly permitted by applicable law notwithstanding
9 this limitation

10 (See Exhibit A).

11 157. By virtue of Defendants' misconduct as set forth hereinabove, Defendants have
12 breached their obligations under the EULA.

13 158. Defendants' misconduct constitutes a material breach of the EULA.

14 159. As a direct and proximate result of Defendants' ongoing violations and the
15 misconduct alleged herein, HPT has suffered, and will continue to suffer substantial injuries, loss
16 and damages in an amount to be proven at trial.

17 COUNT VIII

18 **TORTIOUS INTEFERENCE WITH PROSPECTIVE**
CONTRACTUAL OR ECONOMIC RELATIONS

19 160. HPT repeats and realleges ¶¶ 1 through 81 of the Complaint as if fully set forth
20 herein.

21 161. HPT has maintained valid business relationships with many vendors, resellers
22 and customers.

162. HPT has a reasonable expectation that the relationships with its vendors, resellers and customers will continue and will not be disrupted by Defendants' conduct.

163. Defendants' knew of HPT's relationships and expectations, but intentionally, wrongfully and unjustifiably interfered with those relationships.

164. Specifically, Defendants have solicited vendors, customers and suppliers of HPT to purchase hacked license keys and versions of software with licensing defeated from Defendants, have sold hacked license keys and versions of software with licensing defeated to third parties, and have interfered with HPT's relationships with its vendors, resellers and customers.

165. As a result of Defendants' actions, HPT has suffered irreparable harm for which it has no adequate remedy at law. Unless enjoined, Defendants' will continue to harm HPT's business, causing further irreparable harm to HPT.

166. As a direct and proximate result of Defendants' ongoing violations and the misconduct alleged herein, HPT has suffered, and will continue to suffer substantial injuries, loss and damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, HPT respectfully prays for judgment against Defendants, KEVIN SYKES-BONNET, JOHN MARTINSON and SYKED ECU TUNING INCORPORATED, and in favor of HP Tuners, LLC as follows:

1. Awarding and ordering an accounting and disgorgement of all Defendants' profits and/or damages suffered by Plaintiff due to Defendants' misappropriation of the HPT's confidential and proprietary trade secrets pursuant to:

a. the Computer Fraud and Abuse Act, 18 U.S.C. §1030;

- b. the Defend Trade Secrets Act, 18 U.S.C. §1836 et seq.;
- c. the Washington Uniform Trade Secrets Act, RCW 19.108; and
- d. the Illinois Trade Secrets Act, 765 ILCS 1065/1 et. seq.

warding Plaintiff exemplary damages as authorized by statute for Defendants' riation.

joining Defendants from using misappropriated trade secrets pursuant to

try of a declaratory judgment that Defendants' conduct was a violation of the and Abuse Act, 18 U.S.C. 1030 (a)(4).

joining Defendants from accessing HPT's Protected Computers.

warding such other and further relief as may be just and proper caused by

tion of the Computer Fraud and Abuse Act, 18 U.S.C. 1030 (a)(4).

warding HPT compensatory damages, in an amount to be proven at trial.

warding pre- and post-judgment interest to HPT.

warding HPT a preliminary and permanent injunction enjoining Defendants, ants and employees, and those people in active concert or participation with

- a. Passing off any of their products or services as those of HPT;
- b. Causing a likelihood of confusion or misunderstanding as to the source or sponsorship of Defendants' businesses, products or services;
- c. Causing a likelihood of confusion or misunderstanding as to their affiliation, connection or association with HPT or any of HPT products or services; and

d. Unfairly competing with HPT in any manner.

10. An award of damages in an amount to be proven at trial based on Defendants' unfair competition.

11. An award of damages in an amount to be proven at trial based on Defendants' breach of contract.

12. An award of damages in an amount to be proven at trial based on Defendants' tortious interference with HPT's prospective contractual or economic relations.

13. An order that Defendants be required to file with the Court and to serve upon HPT counsel within ten (10) days after entry of any injunction or order issued herein, a written report, under oath, setting forth in detail the manner in which they have complied with such injunction or order.

14. An award of the costs and expenses, including reasonable attorney's fees, incurred by HPT in connection with this action as provided for by statute.

15. An award of such other and further relief as the Court deems just and proper.

Dated this 8th day of May, 2018.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.

s/ Stephen G. Leatham

Stephen G. Leatham, WSBA #15572
211 E. McLoughlin Boulevard, Suite 100
Vancouver, WA 98663
Telephone: (360) 750-7547
Fax: (360) 750-7548
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(admitted *pro hac vice*)
Marks & Klein
1363 Shermer Road, Suite 318
Northbrook, Illinois 60062

1 (312) 206-5162
2 E-mail: andrew@marksklein.com

3 Attorneys for HP Tuners, LLC

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FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF
AND DAMAGES - page 28

Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611
(360) 750-7547

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all Counsel of Record.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.

s/ Stephen G. Leatham

Stephen G. Leatham, WSBA #15572
211 E. McLoughlin Boulevard, Suite 100
Vancouver, WA 98663
Telephone: (360) 750-7547
Fax: (360) 750-7548
E-mail: sgl@hpl-law.com

**FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF
AND DAMAGES - page 30**

Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, P.S.
211 E. McLoughlin Boulevard, Suite 100
PO Box 611
Vancouver, WA 98666-0611
(360) 750-7547

EXHIBIT B

**Subpoena to Testify at Deposition and Provide Documents
Pursuant to Fed. R. Civ. P. 45 issued to Bobbie Cannata**

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT
for the
Western District of Washington

HP TUNERS, LLC,)	
<i>Plaintiff</i>)	
v.)	Civil Action No. 3:17-cv-05760 BHS
KEVIN SYKES-BONNETT, SYKED ECU TUNING INCORPORATED, and JOHN MARTINSON,)	
<i>Defendant</i>)	

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: BOBBIE CANNATA, 16455 Bonnie Lane, Reno, Nevada 89511

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Sunshine Litigation Services and Technologies 151 Country Estates Cir. Reno, NV 89511 (775-323-3411)	Date and Time: 10/16/2018 10:00 am
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The deposition will be recorded by this method: Stenographic and Video Means

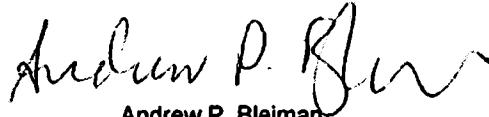
Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: (1) All documents and communications between you and Kevin Sykes-Bonnett; (2) All documents and communications between you and John Martinson; (3) All documents and communications which evidence, refer or relate to your ownership interest in Syked ECU Tuning, Inc.; and (4) All documents and communications which evidence, refer or relate to HP Tuners, LLC, its software and products.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 9/11/2018

CLERK OF COURT

OR


Andrew P. Bleiman

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* HP Tuners, LLC, who issues or requests this subpoena, are:

Andrew P. Bleiman, Marks & Klein, LLP, 1363 Shermer Road, #318, Northbrook, IL 60062 andrew@marksklein.com
212-206-5162

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 3:17-cv-05760 BHS

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any) _____
on (date) _____.

I served the subpoena by delivering a copy to the named individual as follows: _____

on (date) _____ ; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) **For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) **For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) **When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) **When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) **Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT C

November 28, 2018 Order Denying Ken Cannata's
Motion to Quash

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HP Tuners, LLC,

Plaintiff,

v.

Sykes-Bonnett, et al.,

Defendants.

Case No. 3:17-cv-05760-BHS

**ORDER DENYING MOTION TO
QUASH**

11 District Judge Benjamin H. Settle referred to the undersigned magistrate judge all
12 discovery matters in this intellectual property case between plaintiff HP Tuners, LLC, and
13 defendants Kevin Sykes-Bonnett, Syked ECU Tuning, Inc., and John Martinson. Plaintiff alleges
14 violations of the Computer Fraud and Abuse Act, misappropriation of trade secrets under state
15 and federal law, and several other causes of action. This order concerns a motion to quash by
16 non-party Ken Cannata, Dkt. 104. For the reasons discussed below and on the record in a
17 telephone conference on November 26, 2018, the Court will deny the motion.

DISCUSSION

19 Non-party Ken Cannata brought a motion to quash plaintiff's deposition subpoena of his
20 wife, Bobbie Cannata. Dkt. 104. He asserts that the Court should quash the subpoena because
21 Bobbie Cannata has no knowledge relevant to plaintiff's claims, because any relevant
22 information she possesses would be protected by spousal privilege, and because plaintiff issued
23 the subpoena only to harass her. *Id.*

1 Under Rule 26, parties may obtain discovery on any non-privileged matter that is relevant
2 to any party's claim or defense and proportional to the needs of the case. The factors involved in
3 proportionality are the importance of the issues at stake in the action, the amount in controversy,
4 the parties' relative access to relevant information, the parties' resources, the importance of the
5 discovery in resolving the issues, and whether the burden or expense of the proposed discovery
6 outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1).

7 A party—and in certain cases a non-party—may move to quash a subpoena. The Federal
8 Rule of Civil Procedure require the Court to “quash or modify a subpoena that: (i) fails to allow a
9 reasonable time to comply; (ii) requires a person to comply beyond the geographical limits
10 specified in Rule 45(c); (iii) requires disclosure of privileged or other protected matter, if no
11 exception or waiver applies; or (iv) subjects a person to undue burden.” The Court will also
12 quash or modify a subpoena that would require disclosure of information that falls outside
13 discovery permitted by Rule 26. *See Bastida v. Nat'l Holdings Corp.*, 2016 WL 6472648, at *1
14 (W.D. Wash. 2016) (unpublished) (citing *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d
15 774, 779–80 (9th Cir. 1994)).

16 “Ordinarily,” however, “a person other than that against whom the subpoena was issued,
17 lacks standing to move to quash the subpoena.” *Sterling Merch., Inc. v. Nestle, S.A.*, 470 F. Supp.
18 2d 77, 81 (D.P.R. 2006). Courts recognize an exception when the movant “claims a personal
19 right or privilege with respect to the discovery sought in the subpoena.” *Emara v. Multicare*
20 *Health Sys.*, 3:11-CV-6055-RBL, 2012 WL 5205950, at *2 (W.D. Wash. Oct. 22, 2012). The
21 Ninth Circuit has not clarified whether a party ever has standing to quash a subpoena to a third
22 party. *Silcox v. AN/PF Acquisitions Corp.*, 2018 U.S. Dist. LEXIS 53536, at *4 (W.D. Wash.
23 2018) (unpublished) (citing *In re Rhodes Cos., LLC*, 475 B.R. 733, 738-40 (D. Nev. 2012)).

1 In addition, the rule governing motions to quash, Rule 45(d)(3), states that the court with
2 power to quash a subpoena is “the court for the district where compliance is required.” *See Wultz*
3 *v. Bank of China, Ltd*, 304 F.R.D. 38, 43 (D.D.C. 2014) (“[S]ince the text of Rule 45(a)(2) now
4 explicitly requires that ‘[a] subpoena must [be] issue[d] from the court where the action is
5 pending,’ Fed. R. Civ. P. 45(a)(2), and because the underlying litigation is not pending in this
6 Court, this Court *could not* now have issued the subpoena at issue in accordance with Rule
7 45(a)(2).”). Where that court is not the court that issued the subpoena, Rule 45(f) permits the
8 court in the district where compliance is required to transfer a Rule 45 motion to the issuing
9 court, “if the person subject to the subpoena consents or if the court finds exceptional
10 circumstances.” *See Wultz*, 304 F.R.D. at 47.

11 Here, this Court issued the subpoena to Bobbie Cannata. *See Declaration of Andrew*
12 *Bleiman*, Exhibit B, Dkt. 110-2, p. 1 (Bobbie Cannata subpoena). However, the district where
13 Ms. Cannata resides—and thus the district where compliance is required—is the District of
14 Nevada. *See id.*; Fed. R. Civ. P. 45(c)(1). Accordingly, the motion to quash should have been
15 brought in the District of Nevada. Fed. R. Civ. P. 45(d)(3).

16 As noted above, in most cases, only the person against whom a subpoena was issued has
17 standing to bring a motion to quash it. *Sterling Merch.*, 470 F. Supp. 2d at 81. The Court assumes
18 without deciding that Ken Cannata, a non-party, has standing to bring a motion to quash the
19 subpoena directed at Bobbie Cannata, another non-party, because he is asserting a privilege that
20 belongs to him and his spouse. Nonetheless, this motion is premature, it is submitted to the
21 wrong court, and Mr. Cannata fails to establish any grounds for the motion to quash.

22 Mr. Cannata asserts that the marital communications privilege protects any relevant
23 information Ms. Cannata possesses. The marital communications privilege “protects statements

1 or actions that are intended as confidential communications between spouses, made during the
2 existence of a valid marriage.” *United States v. Fomichev*, 899 F.3d 766, 771 (9th Cir. 2018). It
3 makes presumptively confidential (1) “words or acts intended as communication to the other
4 spouse,” (2) “communications made during a valid marriage,” and (3) “marital communications
5 which are confidential.” *Marashi*, 913 F.2d at 729-30. The Ninth Circuit has emphasized a
6 narrow construction of the privilege, observing that “it obstructs the truth-seeking process.”
7 *United States v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990).

8 Plaintiff has plausibly alleged that Ms. Cannata, one of three owners of defendant Syked
9 ECU Tuning, Inc., is likely to possess relevant information about defendants’ “business and
10 business practices,” including information about “her day-to-day involvement in Syked ECU
11 Tuning, communications with and between her co-owners regarding the business and clients of
12 Syked ECU Tuning, her knowledge of the business of Syked ECU Tuning, the identities of other
13 individuals who may possess relevant information, and her knowledge of the company’s
14 possession, use and misappropriation of HPT’s proprietary information.” Dkt. 109, p. 5.

15 In light of Ms. Cannata’s ownership of the business, it is plausible that she has
16 knowledge of the relevant business information plaintiff seeks. Ken Cannata presents no
17 evidence to support his assertions that Ms. Cannata is an owner who is completely ignorant of
18 any relevant information whatsoever -- or that, alternatively, the only relevant information she
19 knows is limited to knowledge she obtained in privileged confidential marital communications.

20 See Dkt. 104, 109.

21 Mr. Cannata may not bring a motion to quash based solely on a hypothetical invocation
22 of joint marital communications privilege. See, e.g., *Briggs v. Am. Laser Centers of Vancouver,*
23 *LLC*, No. C07-5065 RBL, 2007 WL 2116397, at *3 (W.D. Wash. July 19, 2007) (unpublished)

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25

1 (denying motion that argued subpoena should be quashed based on attorney-client privilege,
2 noting that moving party must “support the claimed privilege with a privilege log, i.e., ‘a
3 description of the nature of the documents, communications or things not produced.’” [quoting
4 Fed. R. Civ. P. 45(d)(2)(A)]. Ms. Cannata may assert the marital communications privilege
5 during her deposition if the plaintiff asks a question during the deposition about which Ms.
6 Cannata’s response would necessarily involve privileged information. Ms. Cannata may also
7 assert the privilege by submitting a privilege log that identifies specific privileged information
8 and explains the particular redactions or withheld information, in response to the plaintiff’s
9 subpoena requesting documents, data, and other items relevant to the claims and defenses in the
10 litigation.

11 Then “the court ultimately decides whether, if this claim is challenged, the privilege or
12 protection applies.” *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 162 F.R.D. 490, 492
13 (E.D. Pa. 1995). If Ms. Cannata does assert the privilege, the reviewing court (either court where
14 compliance is required, i.e., the U.S. District Court for the District of Nevada – or if a transfer
15 request is made and granted, the issuing court, i.e., this Court) will then be able resolve any
16 contested privilege issue when it becomes ripe for consideration.

17 Accordingly, the motion to quash, Dkt. 104, is DENIED.

18 DATED this 28th day of November, 2018.

19
20 
21 Theresa L. Fricke
22 United States Magistrate Judge
23
24
25

EXHIBIT D

Declaration of Attempts

<p>STEPHEN G LEATHAM, ESQ 211 E McLoughlin Blvd Ste 100 Vancouver, WA 986633368 CASE NUMBER: 3:17-cv-05760 BHS</p> 	<p>Process Serving & Legal Courier RENO/CARSON/LAS VEGAS Serving all of Nevada Since 1981</p>
<p>GPS: 39.3557472222222;-119.826416666667</p>	<p>SUMMARY OF SERVICE JOB COMPLETE R45472 .PROCESS SERVICE</p>
	<p>COMPLETED BY JENLEE KNIGHT PARKER 9/10/2018 2:19 PM</p>

SUMMARY OF SERVICE

Reference No.:
3:17-cv-05760 BHS

* * NOT SERVED * *

I received the within process on August 27, 2018 and that after due and diligent effort I have been unable to serve said person. The following itemization of the dates and times of attempts details the efforts required to effect service.

Servee: BOBBIE CANNATA

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/27/2018 at 7:12 PM

Results: ATTEMPT : Subject not home . Card left with husband .

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/28/2018 at 4:42 PM

Results: ATTEMPT LEFT CARD: No answer at door. Server left doorhanger with contact information.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/29/2018 at 7:47 PM

Results: ATTEMPT card gone: No answer at door, card gone from previous attempt. Trailblazer SUV on driveway and backed up to garage NV # LT39648.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/30/2018 at 5:53 PM

Results: ATTEMPT : No answer at door. Television and adult human voices and adult human forms heard and seen from balcony over garage. Trailblazer now facing garage doors (same plate # as on previous attempt).

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/31/2018 at 4:00 PM

Results: No answer at door

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/1/2018 at 8:52 AM

Results: ATTEMPT REFUSING TO ANSWER: No answer at door, server noted subjects inside refusing to answer. Children's voices and running footsteps heard immediately after first (of two) times ringing of doorbell.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/2/2018 at 6:10 PM

Results: ATTEMPT : No answer at door. No noise or movement detected from inside house .

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/6/2018 at 6:58 PM

Results: ATTEMPT : Beginning second leg of stakeout.

OFFICIAL AFFIDAVIT OF SERVICE/NON-SERVICE WILL FOLLOW IN THE MAIL

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/6/2018 at 7:26 PM

Results: ATTEMPT : Continuing stakeout.

NOT A PROOF OF SERVICE | SUMMARY OF SERVICE | NOT A PROOF OF SERVICE

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/6/2018 at 7:41 PM

Results: ATTEMPT : Continuing stakeout. Double checked location of house. Garage door seemingly automatic light on garage door above garbage bins.

SUMMARY OF SERVICE

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/6/2018 at 8:21 PM

Results: ATTEMPT : Continuing stakeout. Nothing outside house visible from street. No noise or movement detected from house.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/6/2018 at 8:21 PM

Results: ATTEMPT : Continuing stakeout. Nothing to report as yet.

Summary/R45472

STEPHEN G LEATHAM, ESQ
211 E McLoughlin Blvd Ste 100 Vancouver, WA 986633368
CASE NUMBER: 3:17-cv-05760 BHS



GPS: 39.3558753888889;-119.826863694444



SUMMARY OF SERVICE

JOB COMPLETE

R46606

.PROCESS SERVICE

**COMPLETED BY
SANDRA McCOLLUM
9/10/2018 2:14 PM**

SUMMARY OF SERVICE

**Reference No.:
3:17-cv-05760 BHS**

**** NOT SERVED ****

I received the within process on September 06, 2018 and that after due and diligent effort I have been unable to serve said person. The following itemization of the dates and times of attempts details the efforts required to effect service.

Servee: BOBBIE CANNATA

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/6/2018 at 5:05 PM

Results: ATTEMPT : Stake out beginning

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/6/2018 at 6:56 PM

Results: ATTEMPT : Stake out ending Parker arrived no activity.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/7/2018 at 5:51 AM

Results: ATTEMPT : Stake out beginning

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/7/2018 at 8:13 AM

Results: ATTEMPT : Subject came out of garage in a Cadillac almost ran over server and sped down the road server believes from picture that this was subject.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/7/2018 at 8:29 AM

Results: ATTEMPT : Subject came barreling out of garage at a high rate of speed server tried to approach and was almost run down as she fled at a high rate of speed. Server called client who wanted server to chase her down . Server stated she could not be involved in a high speed chase asked client if he wanted Parker to stay until 11 00 in case she returns he said yes. Server told client she would have office call for further instruction.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/27/2018 at 7:12 PM

Results: ATTEMPT : Subject not home . Card left with husband .

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/28/2018 at 4:42 PM

Results: ATTEMPT LEFT CARD: No answer at door. Server left doorhanger with contact information.

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/28/2018 at 4:47 PM

Results: ATTEMPT card gone. No answer at door, card gone from previous attempt. Trailblazer SUV on driveway and back of property (garage door open).

OFFICIAL RECORD OF SERVICE/NON-SERVICE WILL FOLLOW IN THE MAIL

NOT A PROOF OF SERVICE / SUMMARY OF SERVICE / NOT A PROOF OF SERVICE
Results: ATTEMPT : No answer at door. Television and adult human voices and adult human forms heard and seen from balcony over garage (server can faintly garage door open and close at this point of previous attempt).

Visit our secure website at www.renocarson.com

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 8/28/2018 at 4:48 PM

Results: No answer at door

SUMMARY OF SERVICE

3:17-cv-05760 BHS

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/7/2018 at 8:32 AM

Results: ATTEMPT REFUSING TO ANSWER: No answer at door, server noted subjects inside refusing to answer. Children's voices and running footsteps heard immediately after first (of two) times ringing of doorbell.

Summary/R46606

Attempted at 16455 Bonnie Ln Reno, NV 895119063 On 9/2/2018 at 6:10 PM

Results: ATTEMPT : No answer at door. No noise or movement detected from inside house .